SUPREME COURT, U. S.

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In The

Supreme Court of the United States

October Term, 1963

WILMER D. REKEWEG, AS GUARDIAN OF MITCHELL D. ONSTOTT, A MINOR; AND HARVEY H. ONSTOTT, PETITIONERS,

vs.

FEDERAL MUTUAL INSURANCE COMPANY AND J. B. GUTHRIE, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. ———

WILMER D. REKEWEG, AS GUARDIAN OF MITCHELL D. ONSTOTT, A MINOR; AND HARVEY H. ONSTOTT, PETITIONERS,

vs.

FEDERAL MUTUAL INSURANCE COMPANY AND J. B. GUTHRIE, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment made on October 23, 1963, in this case by the United States Court of Appeals for the Seventh Circuit.

Citations to Opinions Below

The opinion of the judges of the United States Circuit Court of Appeals for the Seventh Circuit is reported at 324 F 2d 150 and is printed in the Appendix hereto, p. 1, et seq. The opinions of the United States District Court for the Northern District of Indiana, Fort Wayne Division, as hereinafter listed are not reported and appear in the

Appendix of Record on Appeal from the circuit court as shown:

September 28, 1962, Record Appendix, p. 32 et seq.

November 28, 1962, Record Appendix, p. 37 et seq.

December 19, 1962, Record Appendix, p. 43 et seq.

Also, the opinion of the district court dated February 24, 1961, is reported in 27 F. R. D. 431 and in pertinent part is printed in the Record Appendix, p. 8 et seq.

Jurisdiction

The jurisdiction of this court is invoked under the provisions of Section 1254 (1), Title 28, United States Code.

The judgment for review is that of the United States Court of Appeals for the Seventh Circuit entered October 23, 1963.

Petitioners ask review of this judgment because they believe:

(1) it decides an important state question in a way that is in conflict with applicable state law;

(2) it decides by inference an important question of procedure in the United States courts by holding, in effect, that under Rule 56, Federal Rules of Civil Procedure, a summary judgment may be granted while there remains a genuine issue as to a material fact, thereby denying petitioners a jury trial;

(3) its implications for beneficiaries of insurance policies and for attorneys, throughout the country, are incalculable and anything but salutary to the ends of justice.

Questions Presented

1. Does Ohio law recognize the common law action of fraud and deceit?

2. Can petitioners, by summary judgment under Rule 56, Federal Rules of Civil Procedure, be deprived of a jury

trial where there are unresolved genuine issues of material fact, and where a jury trial has been timely demanded?

Statutes, Law and Regulations Involved

Section 1332, Title 28, United States Code, in pertinent part provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different states; . . ."

Rule 56, Federal Rules of Civil Procedure, as in effect prior to July 1, 1963, in pertinent part, read:

"• • •

"(b) *For Defending Party.* A party against whom a claim, counter-claim, or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

"(c) *Motions and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. • • •"

Paragraph 4 of the syllabus stating the law of the case of *Jones v. Draper*, 16 OCD 785, 4 Cir Ct R, NS 105, affirmed at 73 O.S. 369, 78 N.E. 1124 (1903) reads:

> "If an inspection was prevented or its completeness defeated by the acts, arts or words of the seller, the reliance of the purchaser upon the statements of the seller without such investigation or after an incomplete investigation, would be justified."

This opinion comments on facts similar to the facts of this case, at 4 Cir Ct R, NS 117 and 16 OCD 796, as follows:

> "'Allowing the other party to proceed upon an erroneous belief to which one's acts have contributed is active concealment tantamount to misrepresentation' (Wald's Pollock on Cont., p. 515, citing cases)."

In syllabi prepared by the court in *Pumphrey v. Quillen*, 165 Ohio St. 343, 135 N.E. 2d 328, 59 O.O. 460 (1956), the Supreme Court of Ohio stated the law of Ohio:

"1. In an action for fraudulent misrepresentation, it is not necessary for the plaintiff to allege and prove that the defendant made the representation knowing that it was false.

"2. In such an action it is not a defense for the defendant to assert that he made the representation without knowing whether it was true or false, if his statement was made under circumstances which implied knowledge on his part."

Statement of the Case

The opinion of the court of appeals (Appendix, pp. 1-4) well states the case except in several fundamentally important respects, viz:

(1) It ignores the fact that respondent Guthrie sought out petitioner's then attorney David Peters of Fort Wayne, Indiana, and on September 11, 1958 discussed with him petitioner's case and affirmatively represented to said attorney that:

> (a) he thought petitioner's case had settlement value;
>
> (b) his company was going to be fair and reasonable in the circumstances;
>
> (c) his company would work out a settlement if at all possible;
>
> (d) no settlement could, of course, be arrived at without final medical reports so the minor petitioner's injuries could be evaluated. Also

(2) It fails to disclose the fact that on this 11th day of September, 1958, when Fett, the alleged tort feasor had been dead only two months and twenty-eight days, Guthrie learned that:

(a) Peters had read the Ohio statutes re claims against estates which give claimants up to four months after the appointment of an administrator or executor in which to file claims as a matter of right and up to five months additional time to persons under disability in which to apply to the probate court for allowance of claim;

(b) Peters was willing to actively strive for an amicable settlement of petitioners' claims, and

(c) Guthrie in no way indicated to Peters he would not disclose knowledge of the Fett estate as Peters requested him to do.

(3) It misstates what happened on December 2, 1958, which was that Guthrie's supervisor was in Fort Wayne and telephoned Peter's office and asked for the medical report conceded by both Guthrie and Peters on September 11, 1958, as being necessary to any evaluation of petitioner's case.

(4) It ignores the fact that in January, 1959, Federal Mutual asked an Ohio attorney if the minor petitioner's claim was barred by Ohio law and on February 11, 1959, was correctly informed that unless appropriate action were taken it would be barred on April 1, 1959.

(5) Although it states that Guthrie telephoned Peter's office on October 3, 1958, and informed his secretary that Fett's estate had been opened in Ohio, it fails to show that this fact is controverted and denied by petitioners' amended complaint and Peters' deposition that he never received any such information from Guthrie until June, 1959; and that Guthrie had previously on May 8, 1959, when questioned by a superior as to what he had done which might subject "us to any criticism" failed to make mention of

conveying to Peters anything about Fett's estate and that upon trial petitioners planned to offer testimony of Peters' two secretaries that no such message was received by them from Guthrie on October 3, 1958, or any other day, as shown by their listing in the pre-trial order as witnesses for petitioners, although petitioners confess they failed to excerpt a copy of the pre-trial order for inclusion in the Appendix of Record on Appeal as per Rule 16 of the Court of Appeals for the Seventh Circuit. The names and addresses of these two secretaries, however, are shown at paeg 3 of the Appendix of Record on Appeal attached to respondents' Answer Brief in the Court of Appeals. Moreover, despite these facts, the opinion assumes that there is no issue as to whether or not Guthrie failed to disclose his knowledge of the Fett estate to a secretary of attorney David Peters on October 3, 1958, or any other day prior to April 1, 1959, which petitioners emphatically deny.

This cause was begun with the filing of a complaint on March 22, 1960, in the United States District Court for the Northern District of Indiana, Fort Wayne Division by petitioner under leave of Section 1332 (a) (1), Title 28, United States Code. By amended complaint filed May 31, 1960, petitioner Harvey H. Onstott was made an additional party plaintiff.

How Questions for Review Are Presented

Petitioners, as plaintiffs, on May 31, 1960, filed their amended complaint which in no way changed the basic cause of action against respondents. Record Appendix, p. 1 et seq.

Respondents, as defendants, on August 30, 1962, filed a motion for summary judgment which the district court, on September 28, 1962, denied. Record Appendix, p. 32, et seq.

Respondents, on October 4, 1962, filed a motion requesting

reconsideration of the court's order denying their motion for summary judgment.

Petitioners, on October 8, 1962, filed a motion requesting leave to file additional affidavit in opposition to respondents' motion to reconsider filed October 4, 1962.

On November 28, 1962, the district court vacated its order dated September 28, 1962 denying respondents' motion for summary judgment and made an order granting them summary judgment. Record Appendix, p. 37 et seq.

On December 19, 1962, the district court vacated the order of November 28, 1962, as having been inadvertently entered and withdrew same until such time as a final order disposing of the whole case as to respondents and the remaining co-defendant David Peters, could be made. Record Appendix, p. 43 et seq.

On February 15, 1963, the district court granted petitioners' motion to dismiss defendant David Peters, with prejudice, and awarded final judgment for respondents as movants entitled to summary judgment. Record Appendix, pp. 51, 52.

On October 23, 1963, the court of appeals for the seventh circuit affirmed the judgment of the district court. Appendix, p. 6.

Reasons for Allowance of the Writ

Petitioners sincerely regret the necessity of calling upon this court in view of the many pressing and volatile problems currently being presented in the fields of civil rights, reapportionment, taxation and administrative law but they sincerely feel that they have been denied basic justice because (1) the courts below have completely failed to recognize the law of Ohio applicable to the facts of this case; and (2) a summary judgment has been improperly utilized

to deny them a jury trial while there remains a genuine issue of material fact.

Petitioners believe that the effect of the judgment below is to hold that a simple affidavit of fact which is contrary to the allegations of the complaint and the deposition of another party, and is inconsistent with a prior statement of affiant made more than a year earlier when his memory should have been much better, can be utilized to establish a fact as genuine and not at issue and not subject to cross examination, unless counter affidavits of all other persons having knowledge of the facts have been filed. But Rule 56, Federal Rules of Civil Procedure, as in effect prior to July 1, 1963, did not require this as did subdivision "D" of Section 2311.041 of the Revised Code in respect to summary judgments in Ohio state courts. Moreover, this Court, petitioners are told, for some time refused to amend said Rule 56 to require counter affidavits in such circumstances. See Wills, "Developments in Summary Judgment Procedures" XXXIV Ohio Bar, p. 1207 at pp. 1213-1214. When amended Rule 56 was adopted by this Court January 21, 1963 (83 S. Ct. 13) it was opposed by two of the justices (83 S. Ct. 43, 44). That no such requirement was present when this case was decided is recognized by this Court in the second paragraph of its opinion in *White Motor Company v. United States*, 372 U. S. 253, 83 S. Ct. 696, 697, 9 L. Ed 2d 738 (Mar. 4, 1963). At the very least, the district court should have, upon the facts of record, given petitioners as plaintiffs reasonable time in which to produce clarifying evidence. The reason is they were not the movants and it was the district court's duty to construe pleadings and evidential material most strongly in petitioners' favor. This definitely was not done. *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620 (at 627); 64 S. Ct. 724; 8 L Ed 967; reh. den. 327 U.S. 767, 64 S. Ct. 941, 88 L Ed 1593. (1944). *Warner v. First National Bank of Minne-*

apolis, C. A. 8, 236 F 2d 853, certiorari denied 352 U. S. 927, 77 S. Ct. 226, 1 L Ed 2d 162 (1956).

Petitioners, however, considering the nature of this action and the Ohio law fail to see how the truth can be ascertained without observation of the actors in this drama upon the stand and under cross-examination. Consequently, summary judgment under the circumstances is not available to the district court and petitioners believe the final paragraph of the Advisory Committee's Note to the Proposed Amendment of Rule 56 (83 S. Ct. 74, 75) eloquently states the reasons why, to-wit;

> "Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows, under subdivision (f) that he cannot at the time present facts essential to justify his opposition."

Petitioners believe that the courts below have held, in effect, that Mr. Justice Oliver Wendel Holmes, Jr. didn't know the elements of the common law action of fraud and deceit and that Ohio does not recognize as actionable this common law action, and that these conclusions are contrary to fact. Mr. Justice Holmes' delineation of the elements of fraud and deceit are all important here because the Supreme Court of Ohio in *Chinn v. Trustees*, 32 Ohio St. 236, (1877) held in the syllabus stating the law of the case:

> "2. The civil action of the Code is a substitute for all such judicial proceedings as were previously known, either as actions at law or suits in equity, and does not embrace proceedings in mandamus."

From this position the Ohio Supreme Court had never before nor has it since deviated or retreated although the Ohio legislature subsequently defined mandamus proceedings as civil actions. In 1926 an Ohio Court of Appeals, in a decision never further appealed, modified, or overruled outlines and confirms the fact that all actions known at common law at the time Ohio first adopted its Code of Civil Procedure effective July 1, 1853, are retained and continued in Ohio, unless subsequently changed by legislative or judicial action. *State, ex rel Board of Education v. Steeley*, 21 Ohio App. 396, 153 NE 285 (1926). If there is any decision of the Supreme Court of Ohio or any Court of Appeals of Ohio, or any Ohio legislative enactment stating that conduct warranting an action in fraud and deceit at common law in 1853 must today be more heinous than then in order to be judicially recognizable, petitioners have been unable to locate it. Consequently, what Mr. Justice Holmes has to say on this question is important here.

Mr. Justice Holmes says of "Fraud, Malice, and Intent" in "THE COMMON LAW", 36th printing, Little Brown & Company, Boston, 1944; at page 132:

"* * * Deceit is a notion drawn from the moral world, and in its popular sense distinctly imports wickedness. The doctrine of the common law with regard to it is generally stated in terms which are only consistent with actual guilt, and an actual guilty intent. It is said that a man is liable to an action for deceit if he makes a false representation to another, knowing it to be false, but intending that the other should believe and act upon it, if the person addressed believes it, and is thereby persuaded to act to his own harm. (Petitioners' Note: In the matter for review here it is the concealment of a vital fact under circumstances amounting to false representation that is

the gravamen of the complaint.) This is no doubt the typical case, and it is a case of intentional moral wrong. Now, what is the party's conduct here. It consists in uttering certain words, (p. 133) so ordered that the utterance of them imports a knowledge of the meaning which they would convey if heard.

"But that conduct with only that knowledge is neither moral nor immoral. Go one step further, and add the knowledge of another's presence within hearing still the act has no determinate character. The elements which make it immoral are the knowledge that the statement is false, and the intent that it shall be acted on.

"The principal question then is, whether this intent can be reduced to the same terms as it has been in other cases. There is no difficulty in the answer. It is perfectly clear that the intent that a false representation should be acted on would be conclusively established by proof that the defendant knew that the other party intended to act upon it. If the defendant foresaw the consequence of his acts, he is chargeable, whether his motive was a desire to induct the other party to act, or simply an unwillingness for private reasons to state the truth. If the defendant know a present fact (the other party's intent), which, according to common experience, made it likely that his act would have the harmful consequence, he is chargeable, whether he in fact foresaw the consequence or not.

"* * *

(p. 134) "With regard to the intent necessary to deceit, we need not stop with the single instance which has been given. The law goes no farther than to require proof either of the intent, or that the other party was justified in inferring such intention. So that the whole meaning of the requirement is, that the natural and manifest tendency of the representation, under the known circumstances, must

have been to induce the opinion that it was made with a view to action, and so to induce action on the faith of it. The standard of what is called intent is thus really an external standard of conduct under the known circumstances, and the analysis of the criminal law holds good here.

(p. 135) "The question is, what known circumstances are enough to throw the risk of the statement upon him who makes it, if it induces another man to act, and it turns out untrue. Now, it is evident that a man may take the risk of his statement by express agreement, or by an implied one which the law reads into his bargain. He may — in legal language warrant the truth of it, and if it is not true, the law treats it as a fraud, just as much when he makes it fully believing it, as when he knows that it is untrue, and means to deceive. If, in selling a horse, the seller warranted him to be only five years old, and in fact he was thirteen, the seller could be sued for deceit at common law, although he thought the horse was only five. The common-law liability for the truth of statements is, therefore, more extensive than the sphere of actual moral fraud.

"(p. 137) The elements of deceit which throw the risk of his conduct upon a party are these. First, making a statement of facts purporting to be serious. Second, the known presence of another within hearing. Third, known facts sufficient to warrant the expectation or suggest the probability that the other party will act on the statement. (What facts are sufficient has been specifically determined by the courts in some instances; in others, no doubt, the question would go to the jury on the principles heretofore explained.) Fourth, the falsehood of the statement. This must be known, or else the known evidence concerning the

matter of the statement must be such as would not warrant belief according to the ordinary course of human experience. . . ."

Petitioners believe that the court below has held that any insurance adjustor may invalidate any policy of insurance by practicing fraud and deceit upon a claimant's attorney through misrepresentations of fact or the equivalent thereof, such as concealing from such attorney knowledge of facts he has promised to reveal, and that this holding is contrary to the case law of Ohio. David Peters, petitioner's attorney in 1958, within two months and 28 days of the death of the insured tort feasor, John Fett, knew the law of Ohio re claims against estates. Adjustor Guthrie's promise to be fair and reasonable and agreement to disclose knowledge of Fett's estate were made one month and two days before petitioner's right to file a claim against Fett estate could possibly be, under Ohio law, terminated as a matter of right, and within five months thereafter as to persons under disability as was the minor petitioner. Consequently, how can his concealment from Peters of this knowledge of the Fett estate being opened in July be, under these circumstances, anything other than unconscionable and calculated to deceive to petitioner's harm?

Concerning representations as to matters of fact, the truth of which can only be established by investigation, the law of Ohio was stated in syllabus, in a case where the sale of oil leases was effected by means of fraudulent representations and which sale was set aside and reconveyance with damages ordered, as follows:

> "If an inspection was prevented or its completeness defeated by the acts, arts or words of the seller, the reliance of the purchaser upon the statements of the seller without such investigation or after an incomplete investigation, would be justified." Jones v.

Draper, 4 Cir Ct R, NS 105, 16 OCD 785, affd. 73 Ohio St. 369, 78 NE 1124 (1903).

In its opinion at p. 117 4 Cir Ct R, NS and p. 796 of 16 OCD, the court quoted with approval the following language:

> "'Allowing the other party to proceed upon an erroneous belief to which one's acts have contributed is active concealment tantamount to misrepresentation.' (Wald's Pollock on Cont., p. 515, citing cases)."

Surely this is precisely the situation encountered by petitioner's attorney in 1958. Certainly it is material that respondent Guthrie spoke to attorney Peters one month and nineteen days prior to November 1, 1958 (when in fact the time expired during which any claimant might have filed claim against the decedent's estate in Ohio as a matter of right) and made certain promises to him and concealed certain exceptionally important information from him which had been the subject of their conversation of September 11, 1958.

To say that attorney Peters had no right to rely on Guthries' misrepresentation (or here the equivalent thereof) because other factors were present does not, under Ohio law, help respondents because in Ohio:

> "It is not necessary to the predication of fraud, that a misrepresentation be the sole cause or inducement of the contract or transaction in question, and the only element relied upon by the representee contributing to the result so long as it does constitute a material inducement."

See *Public Loan Corporation v. Hood*, 71 OLA 423, 427, 125 NE 2d 770 (1955); and *Household Finance Corp. v. Sutich*, 92 OLA 444, 446 (1963).

The Ohio rule that statements of fact may be relied upon even though their untruth can be established by

examination of available public records has, so far as petitioners can discover, never been deviated from by any Ohio court, but has been followed without exception. See last paragraph, *State v. Trisler*, 49 Ohio St. 583, 31 NE 881 (1892); *Perry v. Wills*, 9 OLA 613 (1931); and *Steiner v. Roberts*, 72 OLA 391, 131 NE 2d 238 (1955). In the latter case at p. 242 of 131 NE 2d it was said:

> "* * * Certainly, in such circumstances as we find in this case, a defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud. . . ."

The reliance of the courts below on *Schubert* v. *Neyer*, Ohio App. 165 NE 2d 226, 12 O.O. 2d 231 (1959), is misplaced because it involved no facts or conduct even similar to petitioners cases. In *Schubert* plaintiff bought a house after inspection. Later a part of the steep hillside in back of the house slid down and damaged the house. Plaintiff had observed the hillside and had asked no questions concerning it. He was not in any manner misled by defendant by promises, misrepresentations, or concealment of anything defendant had promised to reveal. Moreover, the courts below, for reasons obscure to petitioners, ignore this pertinent language from this *Schubert* case found at 165 NE 2d 232, and 12 O. O. 2d 236:

> "* * * In other words, there must be a concealment, the party sought to be charged must have had knowledge of the facts asserted to have been let remain undisclosed, and the silence must, under the conditions existing, amount to fraud, because it amounts to an affirmation that a state of things exists which does not, and the uninformed party is deprived to the same extent that he would have been by positive assertion."

Also, this misconduct of Guthrie, under Ohio law, was such as to entitle the adult petitioner to an additional five months in which to petition the Ohio probate court for

allowance of claim. See *In re Estate of Howe*, 107 Ohio App. 361, 159 NE 2d 622, 8 O. O. 2d 321 (1958) Motion to certify overruled Feb. 25, 1959.

To petitioners, the effect of the judgments below, upon every attorney and every beneficiacry of an insurance policy in this country, seems a fantastic one because in effect, it (1) requires that in respect to representations as to matters of fact every attorney must assume that every insurance adjustor is a dishonorable fellow unworthy of belief; and (2) it leaves every beneficiary of an insurance policy whose attorney relies upon an adjustor's misrepresentation of or concealment of a material fact he has promised or obligated himself to reveal without recovery against anyone except possibly his attorney. Petitioners cannot believe this amounts to anything like "equal justice under law," and are certain this result is contrary to the law of Ohio.

The citation by the court of appeals of their own judgment in *Sigler v. Allstate Insurance Company*, 7 Cir., 319 F 2d 418 (1963) in support of the judgment sought to be reviewed seems singularly inappropriate for the reason that that case dealt with misrepresentations of foreign law, not matters of fact necessary to give foreign law effect. Even so, the rule announced in this *Allstate Insurance* case appears to put a premium on rascality, to be a particularly harsh and unsalutary one, and at odds with the preferable rule followed in the 2nd Circuit as announced by the District Judge in *Delson v. Minoque*, 190 F Supp 935, E. D. N. Y. (1961).

Finally, petitioners believe that a fourteen year old boy ought not be deprived of the substance of his cause of action by words and conduct such as occurred here, utilized by an adjustor for the insurance company in his dealings with the boy's attorney. Moreover, such actionable conduct

should result in punitive, as well as compensatory damages, as the Ohio law provides. See *Saberton* v. *Greenwald*, 146 Ohio St. 414, 66 NE 2nd 224, 32 O. O. 454, 165 A.L.R. 599 (1946).

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 14171 SEPTEMBER TERM, 1963.—SEPTEMBER SESSION, 1963

WILMER, D. REKEWEG, as Guardian of MITCHELL D. ONSTOTT, a Minor; and HARVEY H. ONSTOTT.
Plaintiffs-Appellants,
v.
FEDERAL MUTUAL INSURANCE COMPANY, and J. B. GUTHRIE.
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

October 23, 1963

Before CASTLE, KILEY and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* This diversity action was brought in the District Court by plaintiffs-appellants, Wilmer D. Rekeweg, guardian, and Harvey H. Onstott, father, of Mitchell D. Onstott, a minor who was injured in a collision between a bicycle he was riding and an automobile driven by John S. Fett. Fett died nineteen days after the collision. Plaintiffs seek damages from defendants-appellees,[1] Federal Mutual Insurance Company, carrier of Fett's auto-

[1] David Peters, an Indiana attorney, who was first retained to represent the interests of the injured ward, Mitchell D. Onstott, and of plaintiff Harvey H. Onstott, was also originally named as a defendant but was dismissed from the action for a consideration. The complaint asserted liability against him on the ground of negligence through which plaintiff's claims became barred.

mobile liability insurance, and J. B. Guthrie, an adjuster for the insurance company. Liability is predicated upon alleged deceitful and fraudulent action of the defendants by reason of which plaintiffs assert they were barred from prosecuting their claims against the estate of Fett, whose negligence caused the collision and resulting injuries, due to failure to file claims within the prescribed statuory period.

The District Court granted defendants' motion for summary judgment and plaintiffs appealed.

The collision occurred in Ohio and Fett was a resident of Ohio. The parties agree that plaintiffs' alleged causes of action for being fraudulently prevented from presenting their claims against decedent's estate in Ohio are governed by the law of Ohio, where the loss occurred.

The pertinent facts disclosed by the pleadings and the affidavits and documents presented in connection with the motion for summary judgment may be summarized as follows.

The collision giving rise to the injuries to and hospitalization of Mitchell D. Onstott occurred on May 25, 1958. John S. Fett, the allegedly negligent driver of the automobile involved, who was defendants' insured, died June 13, 1958. In June 1958, David Peters, a Fort Wayne, Indiana, attorney was retained to represent the Onstott's interests. Defendant Guthrie, an adjuster representing the defendant insurance company called on the boy's mother on June 18, 1958. She refused to discuss the matter and referred Guthrie to the Onstotts' attorney, David Peters. Guthrie had no further contacts with the Onstotts. He telephoned Peters and they mutually agreed to discuss the claim at a later date when more information was available.

On July 1, 1958, an administrator of Fett's estate was appointed by the Probate Court of Paulding County, Ohio. Under the law of Ohio, upon the expiration of nine months

from the administrator's appointment presentation of the minor's claim against the estate was barred.

In response to a telephone call from Guthrie on August 8, 1958, inquiring whether a medical report had been received, Peters wrote Guthrie August 11, 1958, enclosing a report and requesting a discussion of the claim. Guthrie and Peters conferred on September 11, 1958. Peters had briefed the Ohio law and was aware of the time limitations governing the filing of claims against Ohio estates. Both knew of Fett's death; neither knew of any assets except the automobile; and neither knew that an administrator of Fett's estate had been appointed. In a deposition Peters testified concerning his September 11, 1958, conversation with Guthrie, as follows:

> "I stated that if I learned an estate was opened in Ohio I would communicate with him [Guthrie] and that if he learned of an estate being opened in Ohio I would like to have him advise me that such procedure had taken place. On that occasion we both concluded that as far as we knew Fett had no assets and he had no estate."

Peters further stated that the boy was still under the care of physicians and surgeons at that time and, as yet, he had no evaluation with reference to the injuries.

On September 24, 1958, Guthrie learned that Fett's estate had been opened up on July 1, 1958. He was next in Fort Wayne on October 3, 1958, at which time he telephoned Peters' office but was informed Peters was not in. He left word with one claiming to be a secretary for Peters, to tell him that Guthrie had called, and requested that she inform Peters that an estate for John S. Fett had been opened July 1, 1958. Guthrie was again in Fort Wayne on October 24, 1958, at which time he talked with Peters by telephone and was informed by him that the latest medical report

Peters was expecting had not been received but that a copy would be sent to Guthrie when it was received. On December 2, 1958, Guthrie received a letter from Peters advising that Peters had requested another medical examination of the boy, which would be final, and that as soon as information was received from this examination he would be in a position to negotiate toward disposition of the matter and would advise Guthrie.

Guthrie heard no further from Peters until after April 1, 1959, the date the period for presenting a claim against Fett's estate expired. Plaintiffs had filed no claims. On May 14, 1959, Peters wrote Guthrie that Mitchell D. Onstott had been released by his physicians and that Peters would like to talk with Guthrie with reference to the matter. Peters wrote again on June 2, 1959, inquiring if Guthrie desired to meet with him in reference to the matter. Guthrie telephoned Peters on June 3, 1959, and advised him that no payment would be made because the claim was barred. Peters did not actually learn that Fett's estate had been opened July 1, 1958, until this June 3, 1959, conversation with Guthrie.

We perceive no error in the District Court's award of summary judgment to defendants-appellees. The fact that Guthrie shortly after he learned the estate had been opened, and long before expiration of the period for filing of the plaintiff's claims, left word at Peters' office that the estate had been opened July 1, 1958, negates the presence of intent to deceive either at the time of the September 11, 1958, conversation or thereafter. Surely, in the absence of further inquiry from Peters concerning the opening of the estate Guthrie had no basis to assume that the information had not been given to Peters and to therefore repeat the same in his October 24, 1958 telephone conversation with Peters. Peters had until April 1, 1959, to present the minor's claim

against the estate and he did not contact the defendants after December 2, 1958, at which time he stated he would advise defendants when a report on the final medical examination was received and "we should be in a position to negotiate toward a termination and disposition of this matter", until May 14, 1959, after the limitation period had expired.

Apart from the absence of any showing of intent on the part of the defendants to deceive plaintiffs, or to induce them not to file claims against the estate, there was no misrepresentation on which plaintiffs had a right to reply. Plaintiffs' former attorney was well aware of the Ohio limitations governing the filing of claims against decedents' estates. The opening of an estate for the decedent-insured in Paulding County, Ohio, was a fact equally accessible to both the attorney and the defendants. The September 11, 1958, conversation between the attorney and Guthrie does not import that Peters was to rely upon Guthrie to make the inquiries which might be necessary from time to time to learn if an estate had been opened, ascertain the fact, and supply Peters with the information. Nor under the circumstances here presented did the attorney have a right to rely that such was the understanding nor, under controlling principles stated in the Ohio decisions, to rely upon future silence on Guthrie's part as equating an affirmative representation that no estate had been opened and excusing inquiry on the attorney's part. Peters and Guthrie represented adverse interests and were dealing at arm's length. The attendant circumstances here are not those such as a relation of trust, or of confidence, or of inequality of condition or knowledge, which may give rise to a legal duty to communicate material matter to another and make silence in such circumstances an actionable fraud. Cf.

Schubert v. *Neyer*, Ohio App. (1959), 165 N. E. 2d 226, 231-232. And "[r]eliance—with a right to rely" is an element which "must be present if actionable fraud is to be found." *Crabbe* v. *Freeman*, Mun. Ct. of Col., Ohio (1959), 160 N. E. 2d 583, 585.

Plaintiffs' reliance upon *Pumphrey* v. *Quillen*, 165 Ohio St. 343, 135 N. E. 2d 328, and other cases which involved affirmative false statements and positive misrepresentations is misplaced. Such cases are not apposite on the facts of the case at bar. Here actionable fraud is attempted to be predicated upon silence under circumstances where no right to rely upon that silence existed. Cf. *Sigler* v. *Allstate Insurance Company*, 7 Cir., 319 F. 2d 418, where, in affirming summary judgment for the defendant, this Court held that plaintiffs' attorney's access to sources of information which would have furnished information as to another State's statute of limitations made it unnecessary for the District Court to have resolved the apparent conflict as to whether affirmative misrepresentation with respect thereto had been made to the plaintiffs.

The judgment order of the District Court is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Wednesday, October 23, 1963

Before

Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

WILMER D. REKEWEG, as Guardian of MITCHELL D. ONSTOTT, a Minor; and HARVEY H. ONSTOTT,
Plaintiffs-Appellants.

vs.

FEDERAL MUTUAL INSURANCE COMPANY, and J. B. GUTHRIE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Fort Wayne Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appeal d from be, and the same is hereby, AFFIRMED, WITH Costs, in accordance with the opinion of this Court filed this day.